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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 LOURDES SANCHEZ,

12 Plaintiff,

13
14 vs.

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17 GREENPOINT MORTGAGE
18 FUNDING, INC., BANK OF AMERICA
19 HOME LOANS, ASTEC
20 FORECLOSURE CORPORATION,
21 OCWEN LOAN SERVICING, LLC,
22 COASTAL EMPIRE MORTGAGE,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as
nominee for RWPO III, LLC as
beneficiary and DOES 1-20, inclusive,

Defendants.

CASE NO. 09 CV 2005 JM (WMC)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS OCWEN LOAN
SERVICING, LLC AND RWPO
III, LLC'S MOTION TO
DISMISS; GRANTING
DEFENDANT GREENPOINT
MORTGAGE FUNDING INC.'S
MOTION TO DISMISS; and
GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
A SECOND AMENDED
COMPLAINT**

Doc. No. 19, 20, 22

23 Plaintiff Lourdes Sanchez ("Plaintiff") filed this action raising claims related to a residential
24 mortgage transaction. (Doc. No. 1). After Defendants Ocwen Loan Servicing, LLP ("Ocwen") and
25 RWPO III, LLC ("RWPO") filed a motion to dismiss the complaint, Plaintiff filed a first amended
26 complaint ("FAC") as a matter of course. (Doc. Nos. 5, 14). Ocwen and RWPO then filed a motion
27 to dismiss the FAC. (Doc. No. 19). In addition, Defendant GreenPoint Mortgage Funding, Inc.
28 ("GreenPoint") filed a separate motion to dismiss. (Doc. No. 20). Plaintiff filed oppositions and a

1 motion for leave to file a second amended complaint. (Doc. Nos. 22, 23, 24). GreenPoint filed a
2 reply. (Doc. No. 26).

3 The court finds this matter appropriate for determination without oral argument. *See* CivLR
4 7.1(d)(1). For the following reasons, the court hereby GRANTS IN PART and DENIES IN PART
5 Ocwen and RWPO's motion to dismiss. The court GRANTS GreenPoint's motion to dismiss.
6 Furthermore, the court hereby GRANTS Plaintiff's motion for leave to file a second amended
7 complaint no later than March 19, 2010.

8 **I. BACKGROUND**

9 In July 2007, Plaintiff purchased a home with financing borrowed from GreenPoint. (FAC
10 ¶ 9). Plaintiff used Defendant Coastal Empire Mortgage as her broker. (FAC ¶ 10). Plaintiff is a
11 Spanish speaker and negotiated the loan in Spanish. (FAC ¶ 25). Nonetheless, Plaintiff's loan
12 documents were all in English. (FAC ¶ 25). Defendant Bank of America Home Loans ("BOA") and
13 Ocwen are or were Plaintiff's loan servicers. (FAC ¶ 11). At some point, "Plaintiff began having
14 difficulty paying her mortgage." (FAC ¶ 28). As a result, Plaintiff received notice of a trustee's sale
15 indicated that Plaintiff's home would be sold at a foreclosure sale in September 2009. (FAC ¶ 29).
16 Sometime in the last year, Plaintiff conducted a "forensic audit" which allegedly revealed various
17 irregularities and legal violations related to Plaintiff's loan. (FAC ¶¶ 12-24).

18 **II. LEGAL STANDARD**

19 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the pleadings. *De*
20 *La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). In evaluating the motion, the court must construe
21 the pleadings in the light most favorable to the plaintiff, accepting as true all material allegations in
22 the complaint and any reasonable inferences drawn therefrom. *See, e.g., Broam v. Bogan*, 320 F.3d
23 1023, 1028 (9th Cir. 2003). While Rule 12(b)(6) dismissal is proper only in "extraordinary" cases,
24 the complaint's "factual allegations must be enough to raise a right to relief above the speculative
25 level." *United States v. Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981); *Bell Atlantic Corp. v.*
26 *Twombly*, 550 U.S. 544, 555 (2007). The court should grant 12(b)(6) relief only if the complaint lacks
27 either a "cognizable legal theory" or facts sufficient to support a cognizable legal theory. *Balistreri*
28 *v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1 **III. DISCUSSION**

2 Plaintiff alleges nine claims against the various defendants: (1) intentional misrepresentation;
3 (2) quiet title; (3) violation of Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605;
4 (4) violation of Truth in Lending Act ("TILA"); (5) violation of RESPA, 12 U.S.C. §§ 2607, 2608;
5 (6) violation of California Business and Professions Code section 17200; (7) violation of California
6 Civil Code section 2923.6; (8) violation of California Civil Code section 2923.5; and (9) violation of
7 California Civil Code section 1632.¹

8 **A. Ocwen and RWPO's Motion to Dismiss**

9 **1. Claims Not Asserted Against Ocwen and RWPO**

10 Ocwen and RWPO seek to dismiss a number of claims that Plaintiff does not appear to assert
11 against Ocwen and RWPO. In her opposition, Plaintiff verifies that these claims are indeed not
12 alleged against Ocwen and RWPO. Therefore, insofar as it is necessary, the court dismisses the first
13 (intentional misrepresentation), fourth (Truth in Lending Act), fifth, (RESPA §§ 2607 and 2608), and
14 sixth (Cal. Civ. Code § 17200) claims against Ocwen and RWPO.

15 In addition, Plaintiff contends that in her second amended complaint, she will not assert the
16 seventh (Cal. Civ. Code. § 2923.6) and ninth (Cal. Civ. Code § 1632) claims against any defendant.
17 This admission indicates that Plaintiff has not and cannot state a claim for violations of these statutes.
18 Therefore, the court dismisses these claims without leave to amend.

19 **2. Quiet Title**

20 To state a claim to quiet title, a complaint must be verified and include (1) a legal description
21 of the property and its street address or common designation, (2) the title of the plaintiff and the basis
22 of the title, (3) the adverse claims to the title of the plaintiff, (4) the date as of which the determination
23 is sought, and (5) a prayer for the determination of the title of the plaintiff against the adverse claims.
24 Cal. Civ. Proc. Code § 761.020. The court concludes that Plaintiff fails to sufficiently allege a cause
25 of action for quiet title against Ocwen and RWPO. Plaintiff fails to allege the "specific adverse
26 claims" that form the basis of her cause of action. *See id.* cmt. at ¶ 3. Instead, Plaintiff brings this
27

28 ¹ The caption of Plaintiff's first amended complaint mistakenly lists ten claims, including a claim for breach of fiduciary duty.

1 claim “against all Defendants claiming a right or interest,” but then fails to make specific, factual
 2 allegations against either Ocwen or RWPO. (FAC ¶ 41-44). This is insufficient to provide Ocwen
 3 and RWPO with notice of the grounds upon which Plaintiff bases her cause of action. Accordingly,
 4 the Court grants Ocwen and RWPO’s motion to dismiss Plaintiff’s claim for quiet title.

5 **3. RESPA, 12 U.S.C. § 2605**

6 Section 2605(e) requires “any servicer of a federally related mortgage loan” to acknowledge
 7 receipt of a “qualified written request” within twenty days of receipt. In addition, the loan servicer
 8 must, within sixty days of receipt, “make appropriate corrections in the account,” or conduct an
 9 investigation and provide the borrower with a written explanation of why no corrections are warranted
 10 or why the information requested is unavailable. *See* 12 U.S.C. § 2605(e). Plaintiff alleges that she
 11 submitted a “qualified written request” through counsel on September 2, 2009, but Ocwen never
 12 responded. (FAC ¶¶ 48-49).

13 In opposition, Ocwen requests that the court take judicial notice of a letter purported to be
 14 Ocwen’s response. The court declines to take judicial notice of this letter. First of all, only the second
 15 page of the letter is attached to Ocwen’s request for judicial notice, therefore the court is unable to
 16 verify whether this letter is addressed to Plaintiff or responsive to Plaintiff’s request. (*See* Doc. No.
 17 19). More importantly, however, Ocwen’s letter is neither a public record nor a document referenced
 18 in the complaint. *See Branch v. Tunnel*, 14 F.3d 449, 453-54 (9th. Cir. 1994).

19 Plaintiff has sufficiently pled a violation of section 2605 against Ocwen. Whether Plaintiff
 20 actually sent a qualified written request, and whether Ocwen responded sufficiently, are questions of
 21 fact that will not be determined at the pleading stage. Therefore, the court denies Ocwen’s motion to
 22 dismiss Plaintiff’s fifth claim.

23 **4. California Civil Code section 2923.5**

24 Plaintiff fails to state a claim under section 2923.5. Her allegations merely recite the statutory
 25 language, without providing sufficient factual allegations to state a claim. As Ocwen and RWPO point
 26 out, Plaintiff appears to connect the lack of an actual loan modification with a failure to consider a
 27 loan modification and contact Plaintiff. This is not enough; Plaintiff must provide more detailed
 28 factual allegations. Therefore, Ocwen and RWPO’s motion to dismiss is granted as to Plaintiff’s

1 eighth claim.

2 **B. GreenPoint's Motion to Dismiss**

3 **1. Claims Not Asserted Against GreenPoint**

4 Plaintiff's FAC does not purport to allege the third (RESPA § 2605), seventh (Cal. Civ. Code
5 § 2923.6), or ninth (Cal Civ. Code § 1632) claims against GreenPoint. Therefore, insofar as it is
6 necessary, the court grants GreenPoint's motion to dismiss those claims.

7 **2. Intentional Misrepresentation**

8 Under California law, the elements of fraud are false representation, knowledge of its falsity,
9 intent to defraud, justifiable reliance, and damages. *See Bank of the West v. Valley Nat'l Bank of Ariz.*,
10 41 F.3d 471, 477 (9th Cir. 1994) (citation and quotation marks omitted).

11 Under Federal Rule of Civil Procedure 9, a Plaintiff must plead fraud with particularity. "Rule
12 9(b)'s particularity requirement applies to state-law causes of action." *Vess v. Ciba-Geigy Corp. USA*,
13 317 F.3d 1097, 1103 (9th Cir. 2003). "Averments of fraud must be accompanied
14 by 'the who, what, when, where, and how' of the misconduct charged." *Id.* at 1106 (quoting
15 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). "[A] plaintiff must set forth more than
16 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false
17 or misleading about a statement, and why it is false.'" *Id.* (quoting *Decker v. GlenFed, Inc. (In re*
18 *GlenFed, Inc. Sec. Litig.)*, 42 F.3d 1541, 1548 (9th Cir. 1994)). On a claim for fraud, then, a "pleading
19 is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a defendant can
20 prepare an adequate answer from the allegations." *Moore v. Kayport Package Express, Inc.*, 885 F.2d
21 531, 540 (9th Cir. 1989) (citation omitted). "While statements of the time, place and nature of the
22 alleged fraudulent activities are sufficient, mere conclusory allegations of fraud" are not. *Id.* Further,
23 Rule 9(b) requires a plaintiff to attribute particular fraudulent statements or acts to individual
24 defendants. *Id.*

25 Plaintiff's FAC falls short of the specificity required by Rule 9(b). Plaintiff lacks factual
26 allegations about specifically who made the false representations, when they were made, or how they
27 were false. Therefore, the court grants GreenPoint's motion to dismiss Plaintiffs intentional
28 misrepresentation claim.

1 **2. Quiet Title**

2 As already discussed, Plaintiff fails to state a claim for quiet title. Therefore, the court
3 dismisses this claim against GreenPoint.

4 **3. TILA**

5 A request for any damages under TILA is subject to a one year statute of limitations, typically
6 running from the date of the loan execution. 15 U.S.C. §1640(e). The Ninth Circuit has held equitable
7 tolling of civil damages claims brought under TILA may be appropriate “in certain circumstances,”
8 such as when a borrower might not have had a reasonable opportunity to discover the nondisclosures
9 at the time of loan consummation. *King v. State of California*, 784 F.2d 910, 914-15 (9th Cir. 1986).

10 Although Plaintiff claims that facts to support her TILA claim were discovered during a
11 “forensic audit” conducted in the past year, this allegation is insufficient to toll the statute of
12 limitations. Plaintiff does not allege any facts to suggest that equitable tolling is appropriate; any
13 irregularities in the loan would have been apparent from the face of the documents she received at
14 closing. Therefore, the court grants GreenPoint’s motion to dismiss Plaintiff’s TILA claim.

15 **4. RESPA (§§ 2607, 2608)**

16 The statute of limitations applicable to RESPA claims—other than those pursuant to section
17 2605—is one year. *See* 12 U.S.C. § 2614. As already discussed, Plaintiff fails to allege sufficient
18 facts to toll the statute of limitations. Therefore, the court grants GreenPoint’s motion to dismiss
19 Plaintiff’s RESPA claim.

20 **5. California Civil Code section 2923.5**

21 As already discussed, Plaintiff fails to state a claim under section 2923.5. Therefore, the court
22 grants GreenPoint’s motion to dismiss this claim.

23 **6. California Business and Professions Code section 17200**

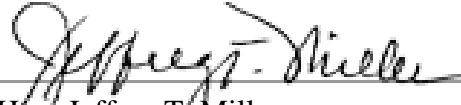
24 California Business and Professions Code section 17200 prohibits “any unlawful, unfair or
25 fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. As asserted, Plaintiff’s section
26 17200 claim requires a predicate violation of a state or federal law. *See In re Late Fee and Over-Limit*
27 *Fee Litig.*, 528 F. Supp. 2d 953, 965 (N.D. Cal. 2007). As all of Plaintiff’s other claims have been
28 dismissed, Plaintiff’s section 17200 claim must also fail.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court hereby GRANTS IN PART and DENIES IN PART Ocwen
3 and RWPO's motion to dismiss. The court GRANTS GreenPoint's motion to dismiss. The court
4 GRANTS Plaintiff's motion for leave to file a second amended complaint. Plaintiff's second amended
5 complaint shall address the deficiencies noted in this order and be filed no later than March 19, 2010.

6 **IT IS SO ORDERED.**

7 DATED: March 4, 2010

8 
9 Hon. Jeffrey T. Miller
United States District Judge